United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-1059

SUSAN L. ROSENSTIEL,

Plaintiff-Appellant,

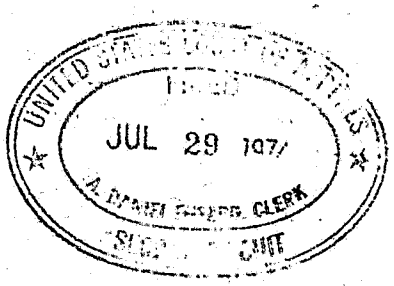
-against-

LEWIS S. ROSENSTIEL,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF



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POINT I

THE TRIAL COURT FINDING THAT PLAINTIFF WAS REPRESENTED BY COUNSEL IN CONNECTION WITH THE EXECUTION OF THE JUNE 15, 1959 AMENDMENT TO THE ANTE NUPTIAL AGREEMENT WAS IN ERROR AND NOT SUPPORTED BY THE RECORD. THE AMENDMENT MUST BE CONSTRUED MOST FAVORABLY TO PLAINTIFF.

The appellee in its brief herein has directed attention to the Trial Court's finding that plaintiff was represented by counsel of her own choosing in connection with the June 15, 1959 amendment to this ante nuptial agreement which contained the disputed defeasance clause (page 34 of Appellee's Brief).

The Trial Court was in error in arriving at the conclusion in its opinion that:

"Even if plaintiff did not herself comprehend the exact meaning of these words, she was represented by counsel of her own choosing."

The uncontroverted evidence adduced at trial clearly showed that although plaintiff was represented by counsel (Mr. Florea) in connection with the *original* ante nuptial, plaintiff was not represented by counsel in connection with the drafting or execution of the June 15, 1959 amendment thereof which contained the defeasance clause.

The following testimony was given at trial (page 119, line 8, et seq.:*

"Q. In June of 1959 was there a second amendment to the original agreement settling property rights prepared?

A. Yes, sir.

Q. The document is dated June 15, 1959. It appears to have been witnessed by Irene McCudden and Milton -- who is that (indicating)?

A. Nauheim, N-a-u-h-e-i-m.

Q. Nauheim?

A. Yes.

---

* Stenographic minutes

THE COURT: Incidentally, how do you spell Nora Hayes' last name? It is difficult to read here.

THE WITNESS: Your Honor, it is Hayes -- H-a-y-e-s.

THE COURT: Thank you.

Q. Would you tell his Honor who it was that drew this second amendment?

A. Judge Marx.

Q. Did you have a lawyer representing you at any time that this second amendment was being granted? (sic - drafted)

A. No.

Q. Were any drafts of this second amendment submitted to you for your personal perusal and comment?

A. No.

Q. Other than the representation which Mr. Florea had rendered on your behalf incidental to the execution of the original agreement settling property rights, had you, up to June of 1959, ever retained a lawyer for any reason at all?

A. I retained Mr. Rosenstiel's attorney, Judge Marx, and Lawrence Levy as I had a Roumanian claim pending in Washington, due to my separation agreement with my former husband.

Q. Outside of engaging your husband's lawyer and your friend, Judge Marx, to act on your behalf in pressing those claims -- probably in blocked funds, was it?

A. Yes.

Q. -- had you had any lawyer perform any legal services for you of any kind whatsoever?

A. No.

Q. Before this second agreement was presented to you for your signature, which appears to have been placed upon it on June 15, 1959, did you have any conversations with Judge Marx concerning this document?

A. He told me that my husband wanted more financial protection for me; that he wanted me to receive it outright free of taxes, and in 1958 -- I had forgotten to say, I am sorry - you asked me -- I was provided for -- my husband made me a present of shares in Hemisphere Limited, and Hemisphere Holding Company, which is now part of IOS Limited and Vesco."

At page 125, Line 24, et seq.:

Q. In 1959, when the second amendment was prepared by Judge Marx, did you have any conversation with your husband concerning the enlargement of your financial security intended to be accomplished by the second amendment?

A. No.

Q. Did you have such a conversation with Judge Marx when he presented the document to you?

THE COURT: I understood from the prior testimony of the witness that there was such a conversation, and my notes indicate that the witness has already testified that the essence of it was that Mr. Rosenstiel wanted more financial protection for Mrs. Rosenstiel.

MR. GRUTMAN: Right.

THE COURT: So I do not want to go over the same ground, but that is my understanding of the prior testimony. If that does not accord with yours, proceed.

BY GRUTMAN:

Q. What I am trying to get more clearly is, did Judge Marx have this conversation with you before he presented the drawn instrument or at the same time that the instrument was presented to you?

A. No, he had the conversation with me that my husband wanted me to have more financial protection, and that I should have it free of taxes outright."

It is clear that the amendment to the ante nuptial agreement of June 15, 1959 containing the defeasance clause was prepared by Lewis S. Rosenstiel's

attorney, Judge Marx. It was not explained to the plaintiff who was *not* represented by an attorney. She was told the amendment was to give her greater financial security.

The appellee's contention that no reason in law or logic supports the construction of the defeasance clause in favor of the plaintiff has no support in law. The language used "divorced --- by a decree of a Court of competent jurisdiction," is subject to at least two constructions presented.

Rules of construction and enforcement are applied to pre-nuptial agreements that require the very highest standard of open disclosure and fair dealing which were not present in the instant case.

> *Pierce v. Pierce,*
> 71 N.Y. 154, 27 Am. Rep. 22 (1877)

Pre-nuptial agreements are accordingly construed most favorably to the wife.

> *Stupell v. Hayes,*
> 189 Misc. 656, 69 N.Y.S.2d 882 (1947)

As said in *Moran v. Standard Oil Co. of N.Y.,* 211 N.Y. 194, 105 N.E. 211 (1914) by Judge Cardozo:

> "The contract was drawn by defendant's lawyers and was tendered to the plaintiff with the assurances, as he says, that his future for

> the next five years would be secure. Since the language is the defendant's, we must construe it if its meaning is doubtful most favorably to the plaintiff."

It is respectfully submitted that the defeasance clause should be construed against the defendant and in favor of the plaintiff to mean "Divorce by a decree of a Court of competent jurisdiction to pass on the marital status and the property rights of the parties." (having "in rem" and "in personam" jurisdiction).

POINT II

THE TRIAL COURT ERRED AND ITS DENIAL OF COUNSEL FEES WAS AN ABUSE OF DISCRETION.

In denying counsel fees to the plaintiff, the Trial Court said:

> "Plaintiff has a substantial income, $96,000.00 per year, from the monthly payments that defendant made to her. Moreover, these claims, although they cannot be denominated frivolous, had minimal merit. Under the circumstances, the Court considers an award of counsel fees to be unwarranted."

The record clearly shows that the Trial Court was in error. Plaintiff received substantially

less than $96,000.00 a year. At page 93a, line 9, et seq., the following testimony of the plaintiff was given:

"Q. What is the amount of the permanent support checks?

A. $5,650.00 - it usually comes late.

THE COURT: I am sorry - is that $5,650.00 per month?

THE WITNESS: Yes, Your Honor. It used to be $8,000.00."

The circumstances under which the payments received by plaintiff were reduced to $5,650.00 from $8,000.00 a month were clearly brought out on cross examination by defendant's counsel. At page 96a, line 13, et seq., the following testimony appears:

"Q. Isn't it a fact that there was a number of judgments entered against you including one by your husband?

A. Yes.

Q. And, pursuant to those judgments, certain amounts were being paid to the judgment debtors prior to your bankruptcy - is that correct?

A. Yes.

THE COURT: Do you mean judgment creditors?

MR. NATHAN: I am sorry - judgment creditors.

Q. Judgment creditors prior to your bankruptcy?

A. Yes.

Q. And that was all pursuant to Court orders?

A. Yes.

Q. So that the testimony to which Your Honor was referring earlier this morning, was as to the amount that you are receiving net after these deductions - isn't that correct?

A. Yes.

Q. And what is that amount so that the record will be clear at this point?

A. $5,650.00.

Q. And has there been an order recently which has increased that amount?

A. Before I received the six-fifty, I was receiving only five-thousand.

THE COURT: When was the increase from $5,000.00 to $5,650.00?

THE WITNESS: The referee increased it to $5,650.00.

THE COURT: Was that referee, Asa Herzog?

THE WITNESS: Yes.

THE COURT: Was that sometime this year?

THE WITNESS: Yes, this has just been for the last two months that he increased it."

The error of the Trial Court has been compounded by the defendant. In the defendant's brief submitted herein, the defendant made the following statement:

> "There is no question that appellant received support payments at the rate of $96,000.00 a year." (Defendant's Brief, p. 41, l. 1)

The record clearly shows that there is no question that the appellant *did not* receive $96,000.00 a year. The failure of defendant to support the claim made in its brief by record references is clearly not due to inadvertence.

The Trial Court was also in error in failing to take into consideration the circumstances of the parties.

Section 237 of the Domestic Relations Law provides in part as follows:

> "..... the Court may direct the husband..... to pay such sum or sums of money to enable the wife to carry on..... the action or proceeding as, in the Court's

discretion justice requires, *having regard to the circumstances* of the case *and of the respective parties.*" (Emphasis supplied)

The facts concerning the circumstances of the parties were:

> "From 1967 when she was awarded $96,000.00 a year in permanent support, a total of $182,000.00 was paid to Phillips, Nizer, Benjamin, Krim and Ballon, who withheld every penny of the support payments from plaintiff; an aggregate of $182,000.00 she never received." (p. 86a, l. 21, et seq.; p. 88a, l. 4)

The plaintiff had exhausted all her personal wealth. At page 89a, l. 18, et seq., the following testimony appears:

> "Q. Have you exhausted all of your personal wealth?
>
> A. I have.
>
> Q. Do you have any jewelry left?
>
> A. Not one. I don't even have a gold watch.
>
> Q. Do you have any money in the bank?
>
> A. Nothing.
>
> Q. Or have you been declared a bankrupt by this Court?
>
> A. I have been declared a bankrupt.

In contrast, the defendant received for his holdings in Schenley alone - $73,310,080.00 (p. 84a, l. 81)

The Trial Court was in error in electing to ignore the circumstances of the parties as directed by the statute and established by uncontroverted evidence.

The claim by defendant in its brief that "if a wife can afford to pay her own legal fees, no award may be made," (Defendant's Brief, p. 40) is not supported by the authorities.

Necessity is no longer the controlling element in determining whether in the exercise of sound discretion, to award counsel fees in matrimonial actions, although it is an element to be considered (Commentary, Section 237, Domestic Relations Law, McKinney's Consolidated Laws of New York).

In the instant case, the need and necessity for an award of counsel fees to defray the expense of legal representation in the trial of this action were demonstrated. The plaintiff lacked all resources. She has been declared a bankrupt. Although she has been award $8,000.00 a month, which the Court had

determined was required for her support, she was receiving only $5,650.00 a month. The Trial Court was substantially mistaken concerning the plaintiff's ability to pay for her own counsel fees. In addition, the Trial Court erred in failing to take into consideration the "circumstances of the respective parties" as mandated by Domestic Relations Law, Section 237.

CONCLUSION

The Judgment of the Trial Court should be reversed. Judgment should be granted:

(1) Ordering the ex parte Florida Divorce obtained by the defendant against plaintiff to be invalid because of the lack of required bona fide domicile of defendant to support the Court's jurisdiction.

(2) Declaring the pre-marital agreement between the parties in full force and effect.

(3) Imposing a constructive trust to provide in defendant's estate assets sufficient to satisfy plaintiff's rights under the ante-nuptial agreement.

(4) Remanding the matter to the Trial Court for a hearing and allowance of counsel fees, pursuant to Section 237 (4) and (5) of the Domestic Relations Law.

Respectfully submitted,

JESSE COHEN
Attorney for Plaintiff-
Appellant

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Reply Brief

IS HEREBY ADMITTED.

DATED: 7/29/74

Greenbaum, Wolff & Ernst

Attorney for by Helen Mercandetti.